

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
LSU ALUMNI ASSOCIATION)	File Nos. 0004220200, 0004220521
)	
Application for Renewal of License of)	
Educational Broadband Service Station WND423)	
and Request for Waiver of Section 1.949(a) of the)	
Commission's Rules)	
)	
Application for Extension of Time to Construct)	
EBS Station WND423 and Request for Waiver of)	
Section 1.946(e) of the Commission's Rules)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 2012

Released: March 29, 2012

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny a request for waiver to allow consideration of a late-filed renewal application. We find that the licensee has acted with an extreme lack of diligence such that grant of a waiver would not be in the public interest.

II. BACKGROUND

2. On October 20, 1995, LSU Alumni Association ("LSU") filed an application for a new Educational Broadband Service ("EBS") station in Ferriday, Louisiana.¹ On July 30, 1998, LSU was granted an authorization under call sign WND423.² Under former Section 73.3598(b) of the Commission's Rules, LSU was to have constructed or filed an extension of time to construct on or before January 30, 2000.³ LSU claimed that Worldcom, its excess capacity lessee, failed to timely file an extension of time to construct.⁴ Subsequently, LSU and Worldcom filed an extension of time to construct, but that application was dismissed on November 7, 2001.⁵

3. In 2003, the Commission suspended construction deadlines then applicable to licensees in the band,⁶ and established a plan to transition EBS and BRS licensees to their new channel locations.⁷ The

¹ File No. BPIF-19951020AH (filed Oct. 20, 1995).

² File No. BPIF-19951020AH (granted Jul. 30, 1998).

³ See 47 C.F.R. § 73.3598(b) (1998).

⁴ Petition for Reconsideration and Waiver Request, LSU Alumni Association (filed Dec. 17, 2008) (Petition) at 2.

⁵ File No. BEIF-2001038AAA (dismissed Nov. 7, 2001).

⁶ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, (continued....)

transition of the 2500-2690 MHz band is now nearly completed.⁸ In 2006, the Commission replaced the suspended construction deadlines with a requirement that all BRS and EBS licensees demonstrate substantial service by May 1, 2011.⁹ The purpose behind the requirement is to “ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services.”¹⁰

4. On June 26, 2007, Sprint-Nextel Corporation (“Sprint”) filed an Initiation Plan to transition the Natchez, Mississippi Basic Trading Area (BTA315), where Station WND423 is located, from the old band plan to the new band plan.¹¹ Station WND423 was included in the list of stations to be transitioned in BTA315.¹² On October 3, 2007, Sprint reported that it had completed the transition in BTA315 and that Station WND423 (as well as the other stations in the Natchez BTA) had been transitioned).¹³

5. On July 11, 2008, LSU timely filed an application to renew Station WND423.¹⁴ On August 27, 2008, the Wireless Telecommunications Bureau (“Bureau”) issued a Notice of Return indicating that:

According to our records, the deadline for constructing Station WND423 is January 30, 2000, and we have no record that a notification of completion of construction or a request for extension of time to construct is on file. Within 60 days of the date of this letter, please provide evidence that either (a) the station was constructed prior to the deadline, and notification of completion of construction was submitted to the Commission, or (b) evidence that a timely request for extension of time to construct was filed, and such request was granted or was never acted on.¹⁵

The Notice of Return also stated that the Bureau could not process LSU’s application until LSU filed

(...continued from previous page)

Notice of Proposed Rulemaking and Memorandum Opinion and Order, WT Docket No. 03-66, 18 FCC Rcd 6722, 6805 ¶ 200-201 (2003) (*NPRM*).

⁷ *BRS/EBS R&O*, 19 FCC Rcd 14165, 14197-14198 ¶ 72.

⁸ See WT Docket No. 06-136.

⁹ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*, WT Docket No. 03-66, *et al.*, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21FCC Rcd 5606, 5733 ¶ 303 (2006) (*BRS/EBS 2nd R&O*). BRS Basic Trading Area (BTA) authorizations granted after November 6, 2009 have four years from the date of grant to demonstrate substantial service and need not make any showing at this time. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, WT Docket No. 03-66, *Third Report and Order*, 25 FCC Rcd 7743 (2010).

¹⁰ *BRS/EBS 2nd R&O*, 21 FCC Rcd at 5720 ¶ 278, *citing* 47 USC §309(j)(4)(B).

¹¹ Letter from Robert H. McNamara, Director, Spectrum Management, Government Affairs, Sprint Nextel Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Jun. 26, 2007).

¹² *Id.* at 3.

¹³ Letter from Robert H. McNamara, Director, Spectrum Management, Government Affairs, Sprint Nextel Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Oct. 3, 2007).

¹⁴ File No. 0003501272 (filed Jul. 11, 2008).

¹⁵ Notice of Return to LSU Alumni Association, Ref. No. 4776876 (dated Aug. 27, 2008) (Notice of Return) at 1.

Form 602, FCC Ownership Disclosure Information, with the Bureau.¹⁶ LSU did not respond to the Notice of Return within 60 days because the facilities for Station WND423 were not constructed and LSU “was not familiar with the regulatory strategies available.”¹⁷ Consequently, on November 18, 2008, the Bureau dismissed LSU’s Renewal Application without prejudice.¹⁸

6. On December 17, 2008, LSU filed a Petition for Reconsideration and Waiver Request asking the Bureau to reconsider its decision dismissing its application to renew Station WND423 and to waive Section 1.946(e) of the Commission’s Rules, which requires extension applications to be filed before the expiration of the construction period.¹⁹ Also on December 17, 2008, LSU filed an application for extension of time to construct Station WND423.²⁰ On January 6, 2009, the Universal Licensing System automatically dismissed the First Extension Application because the license for Station WND423 had expired and was no longer valid.²¹

7. LSU worked with outside parties to educate itself and prepared a response providing the information requested by the Bureau.²² On December 17, 2008, LSU filed Form 602.²³ LSU also filed its First Extension Application with a waiver request.²⁴ LSU claimed that its filings and “increased regulatory awareness” were changed circumstances that justified reconsideration.²⁵

8. In the September 3, 2009 *Order on Reconsideration*,²⁶ the Bureau’s Broadband Division (“Division”) determined that the decision to dismiss LSU’s renewal application was correct.²⁷ Based upon the information provided in the Petition, however, the Division decided to grant the Petition and reinstate the Renewal Application.²⁸ The Bureau also dismissed LSU’s waiver request without prejudice because the Extension Application was dismissed after the Petition was filed.²⁹ The Bureau ordered LSU to re-file the extension application with a waiver request within 30 days of the release of the *Order on Reconsideration*.³⁰ The Division stated that if LSU failed to file an extension application within that 30 day period, the renewal application should be dismissed for failure to prosecute.³¹

¹⁶ *Id.* at 2.

¹⁷ Petition at 1.

¹⁸ Notice of Dismissal, Ref. No. 4804658 (dated Nov. 18, 2008). Public notice of the dismissal was given on November 19, 2008. See Wireless Telecommunications Bureau Market-Based Applications Action, Report No. 4522, *Public Notice* (Nov. 19, 2008) at 1.

¹⁹ 47 C.F.R. § 1.946(e).

²⁰ File No. 0003680212 (filed Dec. 17, 2008).

²¹ Notice of Dismissal, Ref. No. 4821934 (Jan. 6, 2009).

²² Petition at 2.

²³ Form 602, LSU Alumni Association, File No. 0003680163 (filed Dec. 17, 2008).

²⁴ First Extension Application.

²⁵ Petition at 2.

²⁶ LSU Alumni Association, *Order on Reconsideration*, 24 FCC Rcd 11723 (WTB 2009) (*Order on Reconsideration*).

²⁷ *Order on Reconsideration*, 24 FCC Rcd at 11725 ¶ 6.

²⁸ *Id.* at 11725 ¶ 7.

²⁹ *Id.* at 11725 ¶ 9.

³⁰ *Id.*

³¹ *Id.*

9. On October 16, 2009, outside the 30 day period established by the *Order on Reconsideration*, LSU filed its Extension Application with a waiver request attached.³² On December 8, 2009, the Bureau sent a “Notice of Dismissal” to LSU, stating that the underlying license for WND423 had expired and because of such expiration, the underlying license for WND423 was no longer valid and the application could not be acted upon.³³

10. LSU states that it did not become aware of the “Notice of Dismissal” until mid-January, 2010 because both the mail room employee and the receptionist at LSU were ill during December, leaving the mail room staffed by students and then unstaffed after the school went on winter break.³⁴ According to LSU, by the time the “Notice of Dismissal” “got into the appropriate hands,” the filing deadline for a Petition for Reconsideration had passed.³⁵ On April 21, 2010, LSU filed late-filed applications to renew the license for Station WND423³⁶ and for extension of time to construct Station WND423,³⁷ along with requests for waiver.³⁸

11. Xanadoo Company (Xanadoo) states that it expects to enter into a long-term *de facto* transfer lease arrangement with LSU and to use the spectrum to construct an advanced wireless broadband network in eastern Louisiana if the Waiver Requests are granted.³⁹ On March 22, 2011, the Bureau extended the deadline for EBS licensees to demonstrate substantial service from May 1, 2011 to November 1, 2011.⁴⁰ However, in June 2011, Xanadoo filed for Chapter 11 bankruptcy protection.⁴¹ Since then, Xanadoo has been severely restricted in how it may allocate its financial resources.⁴²

III. DISCUSSION

12. In considering whether to grant waivers to allow a late-filed application for an extension of time to construct and a late-filed renewal application, the Bureau uses the same waiver standard. We may grant such waivers when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.⁴³ LSU argues that it qualifies for waivers under the aforementioned waiver

³² File No. 0004000668 (filed Oct. 16, 2009).

³³ Notice of Dismissal, Ref. No. 4929322 (Dec. 8, 2009).

³⁴ File No. 0004220200 (filed Apr. 21, 2010) (Renewal Application), Waiver Request at 2.

³⁵ *Id.*

³⁶ Renewal Application.

³⁷ File No. 0004220521 (filed Apr. 21, 2010) (Extension Application).

³⁸ Renewal Application, Waiver Request, (Waiver Request); Extension Application, Request for Waiver.

³⁹ See Waiver Request, Exhibit B (Letter from Howard E. Verlin, Executive Vice President, Xanadoo Company to Federal Communications Commission).

⁴⁰ See National EBS Association and Catholic Television Network, *Memorandum Opinion and Order*, 26 FCC Rcd 4021 ¶ 1 (WTB/2011).

⁴¹ See Pegasus Rural Broadband, LLC et al., Case No. 11-11772 (DE June 10, 2011).

⁴² File No. 0004941961 (filed Nov. 7, 2011) (Extension Application, Request for Waiver) at 1.

⁴³ 47 C.F.R. § 1.925(b)(3).

standard and “long-standing precedent.”⁴⁴ Furthermore, LSU acknowledges that its track record of meeting FCC deadlines is “not acceptable” and states that it has taken measures “to remedy that failure.”⁴⁵

13. The Commission’s policy regarding reinstatement procedures in the Wireless Radio Services is as follows: Renewal applications that are filed up to thirty days after the expiration date of the license will be granted *nunc pro tunc* if the application is otherwise sufficient under the Commission’s Rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.⁴⁶ Applicants who file renewal applications more than thirty days after the license expiration date may also request renewal of the license *nunc pro tunc*, but such requests will not be routinely granted, will be subject to stricter review, and also may be accompanied by enforcement action, including more significant fines or forfeitures.⁴⁷ In determining whether to reinstate a license, we consider all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.⁴⁸ Taking into account all the facts and circumstances of the instant matter, including the specific factors set forth by the Commission, we conclude that LSU’s late-filed Renewal Application should be dismissed.⁴⁹

14. LSU has shown an extreme lack of diligence and inability to meet Commission deadlines. In 2008, LSU failed to respond to the Notice of Return and had its renewal application dismissed. In September 2009, the Bureau decided to give LSU another opportunity, reinstated its renewal application, and gave LSU 30 days to refile an extension application. Unfortunately, LSU’s dilatory conduct continued. It did not file an extension application within the 30 day period. Furthermore, after its applications were dismissed, it failed to timely seek reconsideration of the dismissal of those applications. Under those circumstances, we cannot conclude that a waiver would be in the public interest because we cannot conclude that LSU will act in a manner consistent with our rules.

15. LSU argues that “[g]ranting the waiver, reinstating the authorization for WND423 would not frustrate the underlying purpose of the rule but rather would permit LSU to move forward, and enter into an agreement for the provision of broadband wireless services in rural Louisiana...”⁵⁰ LSU also argues that its license should be reinstated because it would be contrary to the public interest to for the Commission to reclaim LSU’s spectrum and then allow it to lie fallow when LSU and Xanadoo could put the spectrum to good use.⁵¹ We reject LSU’s arguments. Given that LSU has held the license for 14 years and never constructed the station, and Xanadoo’s bankruptcy, there is reason to question LSU’s ability to implement its plan. While the spectrum associated with Station WND423 will be returned to the Commission if the licenses are cancelled, which may result in a delay in placing the spectrum in use,

⁴⁴ Waiver Request at 2-3.

⁴⁵ Waiver Request at 2.

⁴⁶ Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission’s Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶ 22 (1999) (*ULS MO&O*). See also *BRS/EBS R&O*, 19 FCC Rcd at 14247-14248 ¶ 216.

⁴⁷ *ULS MO&O*, 14 FCC Rcd at 11486 ¶ 22.

⁴⁸ *Id.* at 11485 ¶ 22.

⁴⁹ See, e.g., *WSYX Licensee, Inc., Order*, 15 FCC Rcd 19084 (WTB PSPWD 2000) (denying a request for waiver of Section 1.949 of the Commission’s Rules to allow submission of late-filed renewal applications after the licenses expired, and dismissing the subject applications).

⁵⁰ Renewal Application at 2.

⁵¹ Waiver Request at 4.

it is equally true that we do not know if or when Xanadoo will be able to put the spectrum to use. We do not know whether Xanadoo will emerge from bankruptcy as a going concern, or when Xanadoo will emerge from bankruptcy – ten months or ten years from now.

16. LSU has not demonstrated unique or unusual circumstances justifying waiver. LSU has missed numerous Commission deadlines for filing for extensions of time to construct Station WND423 and renew the Station license. The Commission has held that an inadvertent failure to renew a license is not so unique or unusual to warrant a waiver of the rules.⁵² In this case, LSU's failure to timely renew its license was caused by its failure to timely respond to the return letter, the *Order on Reconsideration*, and the other opportunities it was given to come into compliance. Each licensee is solely responsible for knowing the term of its license and submitting a renewal application in a timely manner.⁵³ We find that LSU's own inaction, and not circumstances beyond its control, prevented it from constructing a system and offering service to residents of Ferriday.

17. Finally, LSU's reliance on cases granting waivers to late-filed EBS renewal applications is misplaced.⁵⁴ In 2007, the Bureau's Broadband Division granted waivers to 41 licensees permitting them to file untimely renewal applications because doing so would further the transition of the 2.5 GHz band.⁵⁵ The Division reasoned that permitting these 41 applications to be renewed would help the proponent identify valid EBS licenses in need of transition.⁵⁶ That rationale is not applicable here because Station WND423 was transitioned prior to the expiration of its license. In 2009, the Division granted 116 late-filed renewal applications because of a lack of clarity over whether unconstructed EBS stations needed to file renewal applications.⁵⁷ LSU has not argued any such lack of clarity, and in any event, it failed to comply with Commission directives on multiple occasions. We therefore deny LSU a waiver of Section 1.949(a) of the Commission's rules.

18. An authorization for an EBS license automatically terminates if the license expires.⁵⁸ In light of our conclusion that grant of a waiver to LSU is not in the public interest, we find that LSU's license to operate Station WND 423 automatically terminated on July 30, 2008. We will therefore dismiss LSU's Extension Application as moot.

IV. CONCLUSION AND ORDERING CLAUSES

19. For the reasons discussed above, we conclude that the circumstances surrounding LSU's renewal application fail to justify a waiver of Sections 1.949(a) of the Commission's rules. We therefore

⁵² *BRS/EBS R&O*, 19 FCC Rcd at 14248 ¶ 218.

⁵³ See *BRS/EBS R&O & FNPRM*, 19 FCC Rcd at 14248 ¶ 217 ("As an initial matter, the Commission has stated that each licensee is fully responsible for knowing the term of its license and for filing a timely renewal application."); Daniel Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21944, 21972-21973 ¶ 53 (1998) (holding that "[i]t is the responsibility of each licensee to apply for renewal of its license prior to the expiration date of the license," and that "failure of a licensee to receive a [renewal form] from the Commission is no excuse for failure to file a renewal application").

⁵⁴ Waiver Request at 2-3.

⁵⁵ Forty-one Late-Filed Applications for Renewal of Educational Broadband Service Stations, *Memorandum Opinion and Order*, 22 FCC Rcd 879 (WTB BD 2007) (*Forty-one Late-Filed Renewal Order*).

⁵⁶ *Id.*, 22 FCC Rcd at 882-883 ¶¶ 7-8.

⁵⁷ In The Matter of 116 Late-Filed Applications For Renewal of Educational Broadband Service Stations, *Memorandum Opinion and Order*, 24 FCC Rcd 8108, 8116-8117 ¶ 24 (WTB BD 2009).

⁵⁸ See 47 C.F.R. § 1.955(a)(1).

deny the Waiver Request and declare that LSU's license to operate Station WND423 automatically terminated as of July 30, 2008.

20. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925 and 1.949(a) of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.949(a) that the request for waiver of Section 1.949(a) of the Commission's rules filed by the LSU Alumni Association on April 21, 2010 IS DENIED.

21. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.946 and 1.949 of the Commission's Rules, 47 C.F.R. §§ 1.946, 1.949, that the licensing staff of the Broadband Division SHALL DISMISS the application for renewal of Educational Broadband Service Station WND423 filed by the LSU Alumni Association on April 21, 2010 (File No. 0004220200) and the application for extension of time to construct Station WND423 (File No. 0004220521) in accordance with this *Memorandum Opinion and Order* and the Commission's rules and policies.

22. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(1) of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the license issued to the LSU Alumni Association for Station WND423 IS DECLARED TERMINATED as of July 30, 2008.

23. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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